No. 83-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM GOUVEIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ROBERT E. MILLS AND RICHARD RAYMOND PIERCE

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QUESTIONS PRESENTED

1. May the Government, consistent with the Sixth Amendment guarantee of the right to counsel, commit a prison inmate to virtual solitary confinement and, in the absence of any demonstrable threat to the security of the institution, hold him there indefinitely without a lawyer while it builds a criminal case against him?

2. Did the denial of respondents' right to counsel during their prolonged isolation in administrative detention demonstrably jeopardize their ability to mount a defense, justifying the court of appeals' dismissal of the charges against them?

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STATEMENT OF THE CASE

This case raises the question of whether a federal inmate suspected of committing a prison crime, who poses no continuing threat to the security of the institution but is detained and isolated in administrative segregation pending indictment, is constitutionally entitled to the assistance of counsel prior to the completion of the Government's trial preparation and the return of formal charges. As did the district court, the en banc court of appeals answered this question in the affirmative.

1. Respondents' Eight-Month Isolation After the Lompoc Murder and the District Court's Dismissal Of Their Indictments. Thomas Hall was murdered at the Lompoc Correctional Institution on August 22, 1979. Within hours of the crime, respondents were forceably removed from their unit and isolated from the rest of the prison population (Tr. 445-46).[1]

[1] "Tr." signifies the transcript in this case; "Pet. App." signifies the Appendices to the Petition; "Pet. Brief" signifies the brief for the United States; "JA" signifies the Joint Appendix; "CR" signifies the district court clerk's record (which is accompanied by the appropriate docket entry number); and "Ex." signifies an exhibit in this case.

Taken to a prison office for interrogation, respondents were advised of their right to appointed counsel, but when they asked to consult with attorneys, their requests were summarily denied (JA 128). Following this initial investigation, the authorities concluded that respondents "were suspects in the homicide" (Tr. 446), and respondents were transferred to the prison's Administrative Detention Unit ("ADU"), from which they would not emerge until April 21, 1980, when they appeared for arraignment in Los Angeles to plead to a murder indictment that had been returned the previous month (Pet. App. 42a-44a).

The Government could offer no evidence to the district court that respondents were detained in ADU for security reasons. The detention orders prepared on the evening of the murder committed respondents to ADU because they were "pending investigation of a violation of institution regulations" and were "pending investigation or trial for a criminal act" (JA 138, 139). Pursuant to Bureau of Prisons regulations, the printed forms required an explanation of why respondents' continued presence in the general population would jeopardize the security of the institution (28 C.F.R. § 541.22(b)), but the prison's Correctional Supervisor made no reference to security concerns other than to note that respondents were "pending investigation" (JA 138, 139). Indeed, as the Government conceded below, the sole reason for respondents' continued detention after completion of the prison's investigation on September 13, 1979, was the ongoing criminal investigation and impending indictment (Pet. App. 42a-43a).[2]

Throughout their eight-month commitment in ADU, respondents were confined to three-by-five foot cells for all but thirty minutes of each day, with occasional respites in desig-

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[2] The Government also failed to identify any security concerns underlying respondents' eight-month detention in the declarations it filed in opposition to respondents' dismissal motion (JA 140-46), its nineteen page memorandum in opposition to that motion (JA 156-66), or its argument to the district court (JA 170-80). Further, although it submitted substantial objections to the proposed findings of the district court, it took no exception to the determinations that respondents had been held in ADU pending "investigation or trial for a criminal act" (Pet. App. 43a), that respondents' detention "was neither a form of prison discipline nor an attempt to ensure prison security" (Pet. App. 47a) and that respondents "stood accused" of the Hall murder long prior to the return of an indictment (Pet. App. 48a). (*See* JA 167-169).

nated areas of the prison's visiting room. Locked in a prison within a prison, they remained virtually isolated from the entire inmate population. Without funds to hire one, they could not speak to an attorney. They could not contact inmate or staff witnesses. They could not discuss their case with anyone other than prison personnel and FBI investigators. Thus, although almost immediately informed by prison officials that they would eventually be indicated and tried for the Hall slaying, for eight critical months respondents were deprived of any opportunity to prepare to defend themselves against this charge of first degree murder (Pet. App. 44a).[3]

Pursuant to Bureau of Prisons regulations, disciplinary hearings were conducted in September of 1979. Based on evidence consisting only of undisclosed "confidential information," respondents were charged with the Hall murder (JA 136-37). Respondents denied the charges. They again requested and again were denied the assistance of counsel or, for that matter, the assistance of any neutral person to act on their behalf (JA 130). At the conclusion of those hearings, which ended 22 days after respondents' commitment to ADU, prison authorities stripped respondents of all of their accrued good time, and the prison's internal investigation and disciplinary proceedings were closed (JA 137).[4]

Nonetheless, with the knowledge of the FBI agents in charge of the criminal investigation, respondents remained in ADU — ostensibly pursuant to regulations which authorized open-ended detention of "pretrial inmates" (*see* 28 C.F.R. § 541.22(a)(3) & (6)(i)). In the meantime, the FBI and federal prosecutors pursued criminal proceedings at a leisurely pace even though, as the Government conceded below, had respondents been at-large on the evening of the murder, they would have promptly been arrested, taken before a magistrate

[3] The severity of respondents' conditions of confinement, as well as the real-life consequences of their detention on their status with fellow prisoners, were described in a declaration submitted by respondent Mills, the accuracy of which was not challenged by the Government (JA 131-33).

[4] Apparently, no hearings concerning respondents' continued detention were held. Sometime after the final disciplinary hearing, however, Mills was advised that he was being considered for an administrative transfer to the Federal Penitentiary in Marion, Illinois (JA 130). Prison officials took no action to implement the transfer, deeming it "inappropriate" because "of the view that there would be an indictment coming out of this district" (JA 176).

and provided with lawyers (JA 171; Pet. App. 46a). Respondents, of course, were securely confined and isolated in ADU, and the Government was thus under no pressure to tie up the loose ends of its investigation in a timely manner. Indeed, it did not present its case to a grand jury for another seven months — four months after it completed its forensic analyses, five months after it secured the cooperation of various inmate witnesses, and six months after it identified and debriefed the prison employees on whose testimony it expected to rely (JA 147-48; Pet. App. 46a).

Respondents were finally arraigned and provided lawyers on April 21, 1980. Because of the belated appointment of their counsel and respondents' inability to investigate on their own while in ADU, the district court took an unusually active role in supervising discovery in an attempt to assure respondents a fair trial (*see* JA 176). In the court's opinion, however, even the benefits of the most liberal discovery — which it noted the Government strenuously resisted (*id.*) — could not overcome the prejudice resulting from respondents' eight-month isolation without appointed representation. The district court dismissed the indictments, having concluded, as expressly stated in its findings, that respondents' lack of representation while in ADU had unalterably impaired their ability to mount a defense (Pet. App. 46a-47a, 49a).

2. Respondents' Trial. For the reasons summarized in the Solicitor General's brief, the district court's order of dismissal was overturned on appeal, and the case remanded for trial. The question of respondents' guilt or innocence was hardly clear-cut during that month-long proceeding. Even the Government's forensic evidence, mentioned only in passing by the Solicitor General, raised substantial doubt about respondents' involvement in the murder. For example, FBI and defense criminologists agreed that hair samples extracted from stocking masks admittedly worn by the assailants could not have come from either respondent (Tr. 392-93, 397-400). Perhaps most importantly, the prosecution's sole percipient witness and pathologist alike testified that the murder was committed by someone stabbing with his right hand (Tr. 93, 458), and yet the trial evidence unquestionably established that respondent

Pierce, who was alleged to have wielded the knife, was left-handed (Tr. 1113-16, 1120-23, 1129).

The prosecution's identification testimony was also riddled with inconsistency. The Government placed considerable reliance on Clifford Wilson, a prison guard who purportedly saw respondent Mills flee from the murder scene. Yet, the prosecution's principal inmate witness testified before the grand jury that he discovered Guard Wilson asleep at his desk moments after the murder (Tr. 128-29). The prosecution's sole eyewitness to the assault, inmate Gary Mellon, was contradicted by four other inmates, including one called by the prosecution (Tr. 154-55, 992, 1029-30, 1084-50). All four were present at the scene and each testified that the assailants' faces were masked during the murder. Further, Mellon testified for the prosecution only after striking a bargain which he virtually acknowledged at trial had earned him a release after serving only three years of a thirty-year sentence (Tr. 135).[5]

Although handicapped by their lack of representation during the eight months following the Hall murder, respondents were able to offer the testimony of a number of inmates who, with varying degrees of certainty, placed respondents in the prison dining hall at the time the institution was "locked-down" in the aftermath of the murder (e.g., Tr. 756-58, 777-79, 801-04, 819-24, 849-51, 1135-37). Three other inmates testified that they were seated adjacent to the only entrance to the murder-scene unit but could not recall either respondent entering or leaving the unit at the time of the murder (Tr. 682, 708-09, 728).

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[5] The remainder of the prosecution's case consisted of ambiguous physical evidence and wholly dubious inmate witness testimony. For example, inmate Kurt Ehle — a self-styled Jewish member of the Aryan Brotherhood — testified that Mills plotted the Hall murder in his presence. Yet, Ehle conceded that he had arrived at the institution just one week before, was introduced to Mills only after the murder and was literally a complete stranger to Mills at the time of the alleged conversation (Tr. 595). In the same vein, the prosecution relied on inmate Butch Wagner's recollection of incriminating conversations Mills allegedly had with another inmate when all three were in ADU following the Hall murder. Wagner admitted, however, that at the time he was in protective custody in ADU at his own request and therefore was "pretty much off limits" to all other detainees, who suspected he was a "snitch" (Tr. 355).

More compelling, however, was evidence concerning the victim. According to prison records, Tom Hall was an unsettled, young convict who was active in the prison's drug commerce. Hall had experienced recurrent problems getting along with his fellow prisoners (Tr. 165-67, 1097, 1108-09, 1451). In fact, months before his alleged dispute with Mills over a debt (and prior to respondent Pierce's arrival at Lompoc), Hall had been labeled a "snitch" (Tr. 1086, 1109) and unidentified inmates firebombed his cell. Soon thereafter, Hall requested that he be placed in ADU for his own protection (Tr. 1086-88, 1093, 1102-03). Writing to his parents from ADU in April 1979, four months before his death, Hall penned a farewell letter and asked that it be read "at my funeral" (Ex. 105B; Tr. 1104-05).

3. The Dismissal of the Indictments by the En Banc Court of Appeals. The issue as defined by the en banc court of appeals was "whether, under any circumstances, a federal prisoner suspected of committing a crime while in prison and placed in administrative detention is constitutionally entitled to an attorney prior to indictment" (Pet. App. 2a). The court began its analysis by observing that the right to counsel attaches when "an attorney is necessary to preserve the accused's right to a fair trial or to ensure that the accused will receive effective assistance of counsel at the trial itself" (*id.* at 6a). Under this standard, the court reasoned, open-ended detention of an inmate-suspect in ADU compels the appointment of counsel if the inmate is to be assured a fair trial. It noted that "an inmate suspected of crime must overcome investigatory obstacles even greater than those facing the prosecution," including the rapidly changing composition of the prison population and the reluctance of inmates to become involved (*id.* at 11a-12a). The court concluded that "early access to the general prison population is critical to the suspect's ability to prepare and preserve a defense" and that prolonged isolation without counsel invariably jeopardizes an inmate's right to a fair trial (*id.* at 12a).

The court of appeals next considered the more difficult issue of whether an inmate isolated in ADU is an "accused" for Sixth Amendment purposes and thus constitutionally

entitled to the assistance of counsel. In analyzing this issue, the court carefully defined the nature of ADU detention it was considering. It noted that respondents had been confined in ADU not as a method of discipline or "to defuse a potentially explosive confrontation and to protect inmates from harm" (Pet. App. 10a). Rather, the court correctly recognized that it was dealing with administrative detention of "an indeterminate period" imposed because of a "pending [criminal] investigation or trial for a criminal act" where no demonstrable security-related justifications existed apart from respondents' status as "suspects" (*id.* at 11a).

Noting that "whether a person stands accused can only be determined from the totality of circumstances" (Pet. App. 8a), the court observed that respondents' pretrial detention served the same objectives that typically prompt an arrest outside the prison walls. There was one crucial difference, however: "[u]pon arrest a defendant must be arraigned 'without unnecessary delay' . . . [at which] point the accused is guaranteed the assistance of counsel" (*id.* at 12a-13a), but within the prison walls no such procedural guarantees operate. The accused is already in the Government's custody, and unless the protection of the Sixth Amendment applies to detainees before the completion of the Government's trial preparation and the inmate's indictment, the prosecution can freely suspend the inmate's right to counsel indefinitely. The court rejected this result as inconsistent with the guarantee of counsel, and held that an inmate pretrial detainee, like an arrestee, is entitled to an attorney upon showing that his confinement in ADU is related to the impending criminal charges and not to any legitimate security concerns of the institution.[6]

Inasmuch as respondents had been isolated in ADU without attorneys for periods of up to twenty months solely because they were the subjects of criminal investigations, the court concluded that they had been denied their Sixth Amend-

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[6] Relying on Bureau of Prisons regulations which, except in extraordinary circumstances, limit investigatory and disciplinary segregation to 30 and 60 days, respectively (*see* 28 C.F.R. §§ 541.13 & 22(c)), the court confined the reach of its holding to inmates held in ADU for more than 90 days (Pet. App. 17a).

ment right to counsel; and it turned its attention to the appropriateness of dismissal as a remedy. After reviewing the record in the *Mills* case, the court agreed with the district court's conclusion that, because of their belated appointment, respondents' attorneys simply could not provide their clients with effective assistance of counsel (Pet. App. 21a). Although the court flatly rejected the Government's contention that respondents' showing of prejudice had been inadequate, it also suggested that in cases such as this prejudice may be presumed "because ordinarily it will be impossible adequately either to prove or refute its existence" (*id.* at 22a). The court found the presumption unnecessary in this case both because of "evidence that 'substantial prejudice' may have occurred" and because of the Government's failure to refute respondents' showing of the likelihood of prejudice (*id.* at 22a).

SUMMARY OF ARGUMENT

The Solicitor General seeks reversal of a rule that was not adopted below. The court of appeals did not construe the Sixth Amendment to require the "appointment of counsel for indigent inmates held in administrative detention for more than 90 days pending criminal investigation" (Pet. Brief 12, 15, 19, 33). Its decision was far more narrow. Recognizing that segregated detention plays an important role in the administration of a prison, it simply held that when an inmate subject to a criminal investigation is detained beyond ninety days in segregated custody pending indictment for no apparent security-related reason, he should be afforded an opportunity to establish that his detention is the result of a decision to hold him to answer impending criminal charges. An indigent inmate who carries this burden, the court reasoned, is as much "accused" as one arrested outside the prison walls, and he is constitutionally entitled to appointed counsel or, alternatively, to be released from segregated custody so that he may take steps to preserve his defense.

1. When used as a method of disciplining inmates, of providing a "cooling-down" period following a breach of prison order, or of ensuring the security of the institution or the safety of other inmates from demonstrable harm, administrative detention is without constitutional significance. On

the other hand, when as here administrative detention is imposed for no security reason but instead solely to hold an inmate to answer impending criminal charges, it becomes the functional equivalent of an arrest and pretrial detention. As such, the imposition of administrative detention is "accusatory," triggering constitutional safeguards equivalent to those that inure when a man outside the prison walls is forcibly removed to the station house and detained to answer criminal charges that the authorities are preparing to bring.

In viewing respondents' segregation as resulting from security concerns, the Solicitor General grievously misapprehends the records in this case. Respondents were detained in ADU not because they threatened the security or good order of the Lompoc Penitentiary. Nor were they held in virtual solitary confinement for periods of up to nineteen months because of any particularized or demonstrable concern for the safety or well-being of other inmates. Rather, as the district court expressly found, and as the court of appeals confirmed, respondents were continued in ADU following a thirty-day prison investigatory period solely because they were the targets of impending criminal indictments.

Thus, the pivotal issue is whether, consistent with the Sixth Amendment guarantee of counsel, the Government may commit an "accused" prison inmate to virtual solitary confinement and, in the absence of any demonstrable threat to the security of the institution, hold him there indefinitely without a lawyer while it builds a case against him. In arguing that it may, the Solicitor General urges acceptance of a principle foreign to our system of criminal justice: that in prison as elsewhere, an individual may be detained in isolation without counsel for as long as the Government takes to prepare its case, hand down an indictment or other formal charge, and thus commence formal, adversary proceedings. This Court has never subscribed to that view. Rather, it has held that the right to counsel attaches during those pretrial phases of a criminal proceeding whenever the absence of counsel would jeopardize the accused's fundamental right to a fair trial.

It cannot seriously be debated that the absence of counsel jeopardizes the fundamental right to a fair trial when an accused inmate is held incommunicado for months and years

without any realistic opportunity of preparing his own defense to a charge the Government alone has the ability to investigate. As borne out by the records in this case, in the unique setting of a correctional institution, protracted delay in the appointment of counsel constitutes a denial of effective representation altogether. Unlike the world outside, the prison population is exceedingly transitory, and inmates know one another not by legal names but by prison sobriquets. Unless promptly located and debriefed, an inmate released from custody or transferred to another institution is frequently irretrievably lost as a defense witness. The irremedial effects of delay in appointing counsel are compounded by an inmate code of ethics which, as a rule, encourages inmates to deny knowledge of relevant information and to fabricate stories to distance themselves from the events in question when interrogated by prosecution investigators. As a result, when for prolonged periods of time only the Government has the ability to investigate, exculpatory witnesses are disabled or neutralized by virtue of their prior inconsistent statements and the fear of potential criminal prosecution for perjury or the giving of a false statement. These and similar inequities have led the drafters of two model codes, including the American Bar Association, to reach the same conclusion as the court of appeals and to limit to ninety days the time an inmate-suspect may be confined in investigatory segregation without constitutional guarantees attaching.

2. This Court has held that when an accused has been denied access to counsel, dismissal of the charges against him is appropriate if the constitutional violation has resulted in "demonstrable prejudice, or [a] substantial threat thereof." *United States v. Morrison*, 449 U.S. 361, 365 (1981). On the basis of the record before them there was more than a substantial basis for the court of appeals and district court to conclude as they did that "the opportunity for [respondents'] counsel to prepare the defense that is constitutionally guaranteed all persons accused of crime did not exist" (Pet. App. 21a). In light of the protracted delay in the appointment of counsel during a period when the Government alone was able aggressively to build its case, both courts ruled that respondents "simply did not have the opportunity to make the kind of

investigation that the government made" (*id.* at 47a), an investigation which was necessary to ensure a fair trial. Potential defense witnesses could no longer recall the events with adequate clarity, or they had long since disappeared after being transferred or released from custody altogether. Physical evidence had either deteriorated or been misplaced. Respondents found themselves entirely foreclosed from effectively investigating the source of earlier threats on the life of Thomas Hall, or the identity of those responsible for a prior attempt on his life. Exculpatory witnesses, who, during the months and years that respondents remained incommunicado, had been forced to submit to FBI interviews and who often fabricated stories so as not to become involved, chose not to testify for fear of the consequences or were discredited at trial by their prior inconsistent statements.

In urging that these considerations were inadequate to satisfy the *Morrison* test of "substantial prejudice or [a] demonstrable threat thereof," the Solicitor General sub silentio asks this Court to overturn *Morrison* and to engraft onto the Sixth Amendment the "actual prejudice standard" applied to the evaluation of claims of undue preaccusation delay under the Fifth Amendment. Even were this Court to put aside the findings of the district court and court of appeals that the proof in this case established actual prejudice, the Fifth Amendment standard is singularly inappropriate for safeguarding the right to counsel under Sixth. Unlike the target of the delayed indictment, who is free to conduct his own investigation and thus capable of subsequently proving actual prejudice, respondents were disabled by the Government from initiating their own defense and denied their right to be assisted by counsel in that endeavor. More importantly, the "actual prejudice" test — which in modern federal jurisprudence few have been capable of satisfying — is far too inadequate a safeguard for the protection of the right to counsel, the cornerstone of our adversarial system of criminal justice.

ARGUMENT

I. IN THE ABSENCE OF LEGITIMATE SECURITY CONCERNS, AN INMATE TAKEN INTO AND DETAINED IN SEGREGATED CUSTODY PENDING INDICTMENT — NO LESS THAN A MAN ARRESTED AND DETAINED OUTSIDE THE PRISON WALLS — STANDS "ACCUSED" OF A CRIME AND IS THEREFORE CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF COUNSEL

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Because respondents were detained and isolated in ADU to answer impending criminal charges, by that detention the Government rendered them accused in the course of a criminal prosecution. By delaying the appointment of counsel for up to twenty months, the Government deprived them of a right due all accused persons, namely, to have the effective assistance of counsel for their defense.

A. For Purposes of the Sixth Amendment, Detention Imposed to Hold an Inmate to Answer Impending Criminal Charges Constitutes an "Accusation"

By its terms, the Sixth Amendment guarantees an "accused" in a "criminal prosecution" the assistance of counsel. Addressing the companion Sixth Amendment right to a speedy trial, this Court has repeatedly construed the term "accused" to encompass persons who have been deprived of their freedom in any significant degree because the Government suspects them of criminal conduct. Thus, in *United States v. Marion*, 404 U.S. 307 (1971), after noting that "the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution" (*id.* at 313), the Court held that the Government renders one an "accused" by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge" (*id.* at 320). Although declining "to extend the reach of the amendment to the period *prior to arrest*," the Court explained

that "accusation" within the meaning of the Sixth Amendment "need not await indictment, information, or other formal charge" (*id.* at 321) (emphasis added).[7]

Because there is no gainsaying that Sixth Amendment principles operate equally within the prison walls, *see Moore v. Arizona*, 414 U.S. 25, 27 (1973); *Strunk v. United States*, 412 U.S. 434, 437-38 (1973), *Smith v. Hooey*, 393 U.S. 374, 378 (1969), the courts below were manifestly justified in concluding that respondents' prolonged detention in segregated custody was tantamount to an "arrest" and, for purposes of the Sixth Amendment, an "accusation" in the course of "a criminal prosecution" (*see* Pet. App. 11a-12a, 47a-48a).[8]

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[7] The Solicitor General focuses on the language in *Marion* that speedy trial rights accrue upon "arrest *and holding to answer a criminal charge*," and apparently suggests that an arrest does not constitute an accusation until the return of some formal process to which the accused must respond (Pet. Brief 30). But as is evident from the discussion in *Marion*, the Court referred to "holding to answer a criminal charge" only to contrast pretrial detention with the situation in which a suspect is briefly detained but then unconditionally released. *See* 404 U.S. at 321 & n.12. Further, any ambiguity in *Marion* as to what constitutes an accusation was resolved by *Dillingham v. United States*, 423 U.S. 64 (1975), a case in which the court of appeals had discounted for speedy trial purposes the period between arrest and the return of charges. The Court reversed. Noting that one is not accused during the Government's investigatory stage, the Court wrote: "In contrast, the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him" (*id.* at 65). *See also United States v. MacDonald*, 456 U.S. 1, 7 (1982) ("In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim.") In any event, *Marion* and *Dillingham* did no more than reaffirm what the Court had earlier held in *Miranda v. Arizona*, 384 U.S. 436, 477 (1966), namely, that an arrest marks the "point that our system of criminal proceedings commences."

[8] The court of appeals properly veiwed its decision as consistent with *Hewitt v. Helms*, 103 S. Ct. 864 (1983), which held that when a state delimits the circumstances under which administrative detention may be imposed, as has the Federal Government, an inmate is entitled to a hearing in connection with his confinement (*see* Pet. App. 17a-18a). But even in the absence of regulations limiting the use of ADU, *Hewitt* would not dictate a contrary result here. *Hewitt* considered principally the question whether confinement in administrative detention implicates "an interest independently protected by the Due Process Clause" 103 S. Ct. at 870. The issue here, unlike in *Hewitt*, is not the right to be free of administrative detention under the Fifth Amendment, but whether confinement under the specific facts of this case gives rise to a right to counsel under the Sixth. Thus, *Hewitt* does not alter the fact that apart from procedural due process considerations,

(Footnote continued on next page)

Respondents were made to suffer significant restraints on their freedom over and above their normal conditions of confinement, conditions which would have allowed them to investigate the charges against them. Despite Bureau of Prison regulations which prescribe that administrative detention "be used only for short periods of time," 28 C.F.R. § 541.22(c), respondents were held for months and years in virtual solitary confinement, isolated even from fellow administrative detainees for nearly twenty-four hours a day.[9] More importantly, respondents were held in ADU to answer impending criminal charges.

1. **Respondents' Detention Was Not Imposed to Ensure the Security of the Institution, but Only to Hold Them to Answer Impending Criminal Charges.** With the possible exception of the initial twenty-two days, respondents' confinement in administrative detention reflected solely a decison to hold them to answer impending criminal indictments. As noted before, respondents were placed in ADU pending the completion of the prison's disciplinary investigation *and* "pending investigation or trial for a criminal act" (JA 138, 139). Yet, the internal investigation and disciplinary proceedings terminated on September 13, 1979 (*id.* at 137), more than seven months before respondents were to emerge from ADU. Indeed, in the proceedings below the Government offered no

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prison authorities may not impose more restrictive conditions of confinement oblivious to the constitutional rights thereby implicated. *See Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978); *State v. Overby*, 249 Ga. 341, 290 S.E.2d 464 (1982); and *People v. Smith*, 117 Misc.2d 737, 459 N.Y.S.2d 528 (Sup. Ct. 1983) (recognizing that segregation of an inmate implicates the right to be free of uncounselled interrogation by authorities that otherwise would be permissible were the inmate in the general prison population). *Cf. Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (procedural due process does not attach to review an inmate's condition of confinement so long as it is "within the sentence imposed upon him *and is not otherwise violative of the Constitution*") (emphasis added).

[9] The Solicitor General belittles the dramatic transformation in respondents' conditions of custody and status within the institution when he says that detainees are entitled to the same privileges as prisoners in the general population (Pet. Brief 15). But the regulations provide for comparable privileges only "[i]f consistent with available resources and the security needs of the unit" (28 C.F.R. § 541.20(d)). For a more realistic portrayal of ADU, see JA 131-33.

explanation for respondents' continued detention other than the impending criminal indictments, and ultimately, it conceded that respondents' isolation was attributable to the ongoing criminal investigation and nothing else.[10]

The Solicitor General thus seeks to recast the records in this case when he urges that respondents' prolonged detention resulted merely from the Warden's legitimate judgment that their confinement was necessary to maintain order in the institution and to protect other inmates from harm. It is undoubtedly true that in particular cases the segregation of an inmate pending investigation may be necessary to "maintain prison security and to assure the safety of prison staff and other inmates, including potential witnesses" (Pet. Brief 25). However, there is absolutely no evidence in the record to establish, as the Government now claims, that such concerns "underlay the placement of respondents in administrative detention" (*id.* at 16). Further, no credible claim can be made in this case that respondents' eight-month separation from the general prison population was necessary to protect potential inmate prosecution witnesses. With the exception of one inmate who demanded a transfer as a prerequisite for even speaking with the FBI, all of the inmates on whose testimony the Government expected to rely at trial had been identified and debriefed within the first fifty-seven days of respondents' detention (Pet. App. 46a; JA 148), and arrangements were made to transfer them to other institutions (JA 145).

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[10] *See supra*, at 2 & note 2. In no fewer than five places, the Solicitor General quotes or paraphrases the language of 28 C.F.R. § 541.22(a), purportedly requiring a finding before committing an inmate to ADU that the inmate's "continued presence in the general population poses a serious threat to" the prison population or the security of the institution. Repetition, however, does not serve to establish a security basis for respondents' detention, who were labelled security risks solely by preprinted language in a detention order and solely because they were "pending investigation" (JA 138, 139). Moreover, as noted before, there is simply no basis for the Solicitor General's claim that Mills was detained for the additional reason that he was about to be transferred to the Marion Facility (*see supra*, at 3 note 4). This explanation would also require an assumption that prison authorities violated their own regulations. With respect to inmates in ADU who are being considered for transfer, Bureau of Prisons regulations provide that prison authorities must within 90 days "return the inmate to the general inmate population or effect a transfer to a more suitable institution." 28 C.F.R. § 541.22(a)(6)(i).

The Solicitor General's purported security justification for respondents' prolonged isolation in ADU also ignores the district court's finding that respondents' "commitment to ADU was neither a form of prison discipline nor an attempt to ensure prison security" (Pet. App. 47a), a finding to which the Government until now offered no objection (*see* JA 167-69). The court of appeals similarly relied on the fact "that pretrial detention was the *only* reason for the Mills' defendants prolonged stay in ADU" (Pet. App. 19a). In fact, the en banc opinion was careful to avoid attaching Sixth Amendment significance to detentions imposed for legitimate security reasons:

> "Importantly, appellants do not contend that temporary isolation carries with it a right to appointed counsel when the detention is imposed for security reasons. Nor could they. Prison officials are charged with maintaining order and ensuring the safety of inmates and prison employees. Serious crimes compound the difficulty of this responsibility in what is necessarily a volatile environment. Temporary isolation, imposed to defuse a potentially explosive confrontation and to protect inmates from harm, is part of the correctional process. It is unrelated to any subsequent criminal prosecution" (Pet. App. 10a-11a).[11]

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[11] That respondents were held in ADU in the absence of any legitimate security concerns distinguishes this case from the lower federal court decisions cited by the Solicitor General for the rule that detention of an inmate triggers no Sixth Amendment rights. For example, in *United States v. Duke*, 527 F.2d 386 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976), the issue was whether imposition of 35 days of segregated confinement gave rise to the Sixth Amendment right to a speedy trial when the detention was used "as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population" (*id.* at 390). Although the Fifth Circuit identified no speedy trial right in *Duke*, it made clear its view that administrative detention is immune from Sixth Amendment consequences only to the extent that it is "*in no way related to or dependent on prosecution by the federal government* of an inmate for that same offense as a violation of federal criminal law" (*id.*) (emphasis added). In contrast, respondents' confinement in administrative detention was not only related to a prosecution by the Federal Government; that prosecution was the sole reason for its imposition (or at least continuation) in the first place.

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2. The Solicitor General Is Wrong When He Presumes A Security Basis For Respondents' Eight-Month Isolation In Administrative Detention. Finding no support in the records in this case, the Solicitor General suggests that inmates under criminal investigation may presumptively be deemed security risks because of the abstract possibility that they may impede the Government's investigation, and therefore, that their placement and detention in ADU is without constitutional significance (Pet. Brief 27-29). But the premise of that argument is at odds with decisions of this Court. In *Hughes v. Rowe*, 449 U.S. 5 (1980), an inmate of the Illinois State Penitentiary sought relief under 42 U.S.C. § 1983 for his commitment and detention in segregation without a prior hearing. His complaint had been summarily dismissed below in part because he was under criminal investigation at the time of his detention for the same conduct which resulted in his segregation. The dissenting opinion viewed this factor as sufficient reason to dispense with a hearing, noting that the bare possibility of "alibi construction and witness intimidation" would establish a conclusive basis for segregation (*id.* at 22). A majority of the Court sharply disagreed. It ruled that if the petitioner's allegations were true he would have a valid Section 1983 claim against his keepers, and in a per curiam

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A view identical to that in *Duke* was expressed in *United States v. Smith*, 464 F.2d 194, 196-97 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972), where the court rejected a speedy trial claim of inmates confined in administrative detention "for disciplinary reasons, for the protection of the victim, because of their previous harassment of other inmates, and to prevent the possibility of escape." The court held: "Segregated confinement *for institutional reasons* is not an arrest" (*id.* at 196-97) (emphasis added). Speedy trial claims were also rejected in *United States v. Mills*, 704 F.2d 1553, 1556 (11th Cir. 1983) and *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976), where the confinement was "disciplinary segregation," and in *United States v. Manetta*, 551 F.2d 1352, 1354 (5th Cir. 1977) where, the court noted, administrative detention was imposed for reasons not appreciably different than in *Duke*. The only decision conceivably intimating a contrary view is *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979), where the defendant claimed he was "placed in administrative segregation pending institution of criminal proceedings." The decision is unclear, however, as to whether prison authorities had independent reasons for imposing the detention. *See id.* at 647 n.3. *Cf. United States v. Brooks*, 670 F.2d 148, 151 (11th Cir.), *cert. denied*, 457 U.S. 1124 (1982) (declining to reach the issue of whether placement "in disciplinary segregation constitutes an arrest for Speedy Trial Act purposes").

opinion it condemned the notion that all inmate-suspects may be presumed to be security risks:

> "The dissent also speculates that inmates suspected of violations of prison regulations, if allowed to remain in the general prison population pending disciplinary proceedings, will fabricate alibi defenses and intimidate potential witnesses. [citations omitted]. This danger would apparently justify automatic investigative segregation of all inmate suspects. . . . While investigative concerns might, in particular cases, justify prehearing segregation, nothing in the present record suggests that these concerns were at work in this case." *Id.* at 13-14n.12.[12]

Further, the Government's presumption of dangerousness has been dismissed by the drafters of two model codes, who have wrestled with the legitimacy and fairness of isolating an inmate who has become the subject of a criminal investigation because of conduct committed at the institution. Both the American Bar Association and the National Conference of Commissioners on Uniform State Laws have rejected open-ended investigatory detention as being inimical to the interests of both the inmate and the institution. Instead, they advocate a prompt determination of whether an inmate is to be prosecuted and believe, as did the court of appeals, that investigatory preindictment segregation should be limited to ninety days. Beyond that period, administrative confinement may continue under their standards only if the prosecution obtains an indictment or files an information, at which time Sixth Amendment guarantees plainly attach.[13]

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[12] *See Kelly v. Brewer*, 525 F.2d 394, 401 (8th Cir. 1975) (rejecting the contention that an inmate's *conviction* for murdering or attempting to murder a staff member "ipso facto establishes, prima facie, if not conclusively, that the inmate is a fit subject for administrative segregation for a prolonged and indefinite period of time"). *See also Hewitt v. Helms*, 103 S. Ct. 864, 874 n.9 (1983) (although isolation of an inmate pending resolution of misconduct charges may be necessary in particular cases to preserve the integrity of the prison investigation and disciplinary proceedings, periodic reviews of the confinement must be made to ensure that its continuation is justified); *id.* 881-82 (Stevens, J., dissenting) ("the mere notation on a record, 'there is an ongoing investigation,' should not automatically validate the continuation of solitary confinement").

[13] See 4 ABA *Standards for Criminal Justice*, Legal Status of Prisoners, Standard No. 23-3.3(b) (adopted Feb. 9, 1981); National Conference of

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When stripped of the Solicitor General's unsupportable security rationale, respondents' detention in ADU following the termination of prison disciplinary proceedings bears all the trappings of an arrest and accusation outside the prison walls. Indeed, the court of appeals' unassailable analogy to a conventional arrest and detention was conceded by the prosecutor in this case, who acknowledged to the district court that had respondents been at-large shortly after the Hall murder, he would have promptly ordered their arrest (JA 171). And, as he further conceded, once in custody respondents would have been entitled under Federal Rules of Criminal Procedure 5(a) and 44(a) to a prompt arraignment and the appointment of counsel (*id.*).

3. The Concepts of Arrest and Accusation Must Apply to Inmates Detained to Answer Impending Criminal Charges if the Sixth Amendment Is to Operate at All Within the Walls of a Prison. To say that respondents did not stand accused of a crime by virtue of their eight-month detention in ADU, and thus were not entitled to counsel, is to argue that the Sixth Amendment stops at the prison gate, a proposition repeatedly rejected by this Court. Indeed, in a closely analogous setting, this Court held that a prison inmate suspected of a crime, no less than a free man, is constitutionally entitled to the procedural safeguards afforded by the Sixth Amendment. *See, e.g., Smith v. Hooey*, 393 U.S. 374, 377 (1969).[14]

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Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-511, 10 U.L.A. 316 (Supp. 1983). *See also* National Sheriffs' Ass'n, *Inmates' Legal Rights* 38 (1974) (inmate suspect's custody status should be increased pending prosecution only "if it is believed that the inmate presents a threat to himself or other inmates or is an escape risk"). *See generally*, Miller, *Taking The Rule of Law To Prisons*, 64 A.B.A.J. 990, 992 (1978).

[14] Speaking of the Speedy Trial Clause, the Court in *Smith v. Hooey* wrote:

"There can be no doubt that if the petitioner in the present case had been at large for a six-year period following his indictment, and had repeatedly demanded that he be brought to trial, the State would have been under a constitutional duty to try him. *Klopfer v. North Carolina*, [386 U.S. 213, 219 (1967)]. And Texas concedes that if during that period he had been confined in a Texas prison for some other state offense,

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More importantly, the position seemingly espoused by the Solicitor General admits of no limitations. If the concepts of arrest and accusation do not apply to those already in custody under a lawful sentence, what prevents federal agents from removing an inmate-suspect to the nearest pretrial detention facility and holding him there indefinitely without counsel until the Government is prepared to indict? The one lower federal court to confront this situation categorically rejected this contention. In *United States v. McLemore*, 447 F. Supp. 1229 (E.D. Mich. 1978), defendant had escaped from a federal treatment center to which he had been transferred in anticipation of his release on parole. After being apprehended by FBI agents, who initially turned him over to the local police, defendant was returned to the Federal Correctional Institution at Milan, Michigan, where for nine months he was confined in the prison's detention unit pending indictment for escape. Finding that defendant's detention constituted an "accusation" for purposes of the Sixth Amendment, the court rejected the claim that because the defendant was at all times within "the legal custody and under the control of the Attorney General," *see* 18 U.S.C. § 4210(a), his seizure and detention by that same authority could not render him an "accused":

> "To follow the government's logic, one would have to conclude that no prisoner or parolee would enjoy the protection of the Speedy Trial Clause before the bringing of formal charges — a proposition which strikes this Court as inconsistent with the spirit of *Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969). . . ." 447 F.Supp. at 1236.[15]

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its obligation would have been no less. But the Texas Supreme Court has held that because petitioner is, in fact, confined in a federal prison, the State is totally absolved from any duty at all under the constitutional guarantee. We cannot agree."

Cf. Mathis v. United States, 391 U.S. 1 (1968) (inmate serving a sentence for unrelated offense is nonetheless entitled to be free of uncounselled custodial interrogation).

[15] Equally unavailing is the argument that the "[i]t is prison authorities, not prosecutors or police, who make the decision to place an inmate in administrative detention and to retain him there" (Pet. Brief 24). For purposes of

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In light of the nature of respondents' preindictment detention and the reason for it, the court of appeals justifiably concluded that respondent's prolonged confinement pending the return of formal charges was the equivalent of an arrest and rendered them "accused" in the course of a "criminal prosecution." The failure to appoint lawyers until arraignment under these circumstances violated the second prong of the Sixth Amendment test — namely, it denied respondents the effective assistance of counsel for their defense and, consequently, a fair trial.

B. Because the Prompt Appointment of a Lawyer Is Essential to Assure a Fair Trial for an Accused Inmate Confined in Administrative Detention, the Court Below Properly Declined to Suspend the Right to Counsel Until Indictment

The Sixth Amendment provides that an "accused" is entitled "to have the Assistance of Counsel for his defence." Although conceding for purposes of argument that as "accuseds" respondents would have been entitled to the "assistance of counsel," the Solicitor General maintains that the Government discharged its constitutional responsibility to them when at their arraignments eight months later it appointed lawyers to defend them. This view is premised on

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activating the Sixth Amendment, the agencies of the Federal Government act as a single sovereign. As the Fourth Circuit explained in *United States v. MacDonald*, 531 F.2d 196, 204 (4th Cir. 1976), *rev'd on other grounds*, 435 U.S. 850 (1978), in language seemingly approved by this Court, *see id.*, 456 U.S. 1, 10 n.11 (1982):

> "For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him. The prosecution of the same charge — murder — that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution."

Cf. Commonwealth v. Chacko, 500 Pa. 571, 580 n.3, 459 A.2d 311, 513 n.3 (1983) (rejecting the argument that because interrogation of an inmate was conducted by "a member of the internal prison staff rather than a police officer," incriminating statements obtained in violation of *Miranda* were admissible).

the argument that regardless of the length of time the Government sequesters an accused to answer impending charges, and regardless of the extent to which prolonged pretrial detention will impair the accused's ability ultimately to defend himself at trial, the right to counsel does not attach until the Government initiates formal adversary judicial proceedings by way of arraignment, preliminary hearing, indictment, information or other formal charge (Pet. Brief 19-21).

This notion is foreign to our system of even-handed justice. *See Coleman v. Alabama*, 399 U.S. 1, 15-16 (1970) (Douglas, J., concurring) (noting with contempt the Soviet practice of detaining suspects incommunicado for up to nine months without counsel). In no American jurisdiction can an individual be arrested and detained to answer charges and yet for months and years be denied legal representation.[16] The Solicitor General offers no rational explanation as to why the rules should be different here, and he misconstrues this Court's prior decisions to marshal support for his frightening suggestion of a connection between the "formality" of the charges and the right to assistance of counsel.[17]

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[16] In federal prosecutions, the prompt appointment of counsel for one arrested and detained is mandated by Fed. R. Crim. P. 5(a) and 44(a), which in combination require federal authorities to bring before a magistrate "without unnecessary delay" an individual they arrest and detain and to provide him with counsel at or before that initial appearance. Our research has confirmed that similar rules or practices are in force in each of the fifty states. The criminal codes of eight states (Arizona, Arkansas, Florida, Mississippi, North Carolina, Oregon, Washington and Wisconsin) require the appointment of counsel as soon as feasible after the defendant is taken into custody but in no event later than the initial appearance — which in all jurisdictions must be conducted without unreasonable delay (typically 24 to 72 hours). Nineteen other states provide for the appointment of counsel at the initial appearance (Alabama, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Vermont, West Virginia and Wyoming). The codes of the remaining states require that an indigent defendant be advised at the initial appearance of his right to request appointed counsel and we are advised by public defenders in these states that such a request would ordinarily be promptly honored. *See also* 1 ABA *Standards for Criminal Justice*, Providing Defense Services, Standard No. 5-5.1 (adopted Feb. 12, 1979) ("Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.")

[17] Indeed, one must consider the potential, unsettling consequences were the Solicitor General's view accepted as constitutional doctrine. Save those

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The Court has never subscribed to the view that no matter how long a suspect's pretrial detention, his right to counsel does not attach until the commencement of formal adversary proceedings. In *Kirby v. Illinois*, 406 U.S. 682 (1972), on which the Solicitor General principally relies, the Court simply declined to extend the *Wade-Gilbert* exclusionary rule to an identification show-up conducted during "a routine police investigation" of a suspect who the police had not even yet decided to detain to answer charges (*id.* at 690-91).[18] The *Kirby* Court simply had no occasion to consider the right to

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precious barriers erected by the Sixth Amendment, little in the Constitution stands in the way of bringing the Gulag to this Nation. Though one taken into custody is entitled to a prompt, neutral determination that reasons exist to justify his arrest, those proceedings need not be adversary and counsel need not be appointed. *See Gerstein v. Pugh*, 420 U.S. 103, 114, 119-20 (1975). Thereafter, nothing in the Constitution mandates the prompt initiation of what the Solicitor General would view as a triggering event — formal charge, arraignment, preliminary hearing or indictment. Under the Solicitor General's view, a person could conceivably be sequestered for months at a time with no one to protest on his behalf and left to the remedy of challenging his prosecution under the Speedy Trial Clause when ultimately counsel was provided.

[18] At the time of the identificaton show-up in *Kirby*, the defendant had merely been brought to the station house for questioning and further investigation. Not until after the show-up had been conducted did the police decide to hold hm to an answer (406 U.S. at 684 & n.1). Thus, under the Court's *Marion* analysis, the defendant in *Kirby* was not even "accused" at the time he claimed to have been denied his right to counsel. Moreover, a number of lower federal courts have interpreted the language of the plurality opinion in *Kirby* on which the Solicitor General relies to mean that arrest and detention can trigger the right to counsel even prior to the return of formal charges depending on the extent to which the forces of the state have "solidified in a position adverse to that of the accused." *Lomax v. Alabama*, 629 F.2d 413, 416 (5th Cir. 1980), *cert. denied*, 450 U.S. 1002 (1981); *see Hall v. Iowa*, 705 F.2d 283, 290 (8th Cir.), *cert. denied*, 104 S.Ct. 339 (1983); *Clark v. Jago*, 676 F.2d 1099, 1111-12 n.16 (6th Cir. 1982); *United States ex rel. Robinson v. Zelker*, 468 F.2d 159, 163 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973). *Cf. United States ex rel. Burton v. Cuyler*, 439 F.Supp. 1173, 1181 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1278 (3d Cir. 1978) ("We do not believe . . . that by simply delaying the occurrence of an arraignment or preliminary hearing (as was done in this case, presumably because [the defendant] was in custody on another charge) the state can in effect suspend the right to counsel until it has neatly tied its case together . . .")

counsel implications of prolonged preindictment confinement such as was the case here.[19]

Far from the wooden approach suggested by the Solicitor General, this Court has consistently held that an accused's right to counsel attaches whenever necessary to assure the fairness of his trial. As the Court wrote in *United States v. Wade*, 388 U.S. 218, 224-25 (1967):

> "The guarantee reads: 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence.*' (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful defence'."[20]

Drawing upon *Powell v. Alabama*, 287 U.S. 45 (1932), which refused to confine the scope of the Counsel Clause to the trial itself, the *Wade* Court explained:

> "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . . The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with

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[19] Similarly, the Solicitor General alludes to dicta when the cites post-*Kirby* cases in support of his argument. In each, no question was raised as to whether the Sixth Amendment right to counsel had attached by the time of the event in question. Rather, the issue was whether the state by specified conduct had violated that right. *See Estelle v. Smith*, 451 U.S. 454, 469 (1981) (a post-indictment Sixth Amendment issue); *Moore v. Illinois*, 434 U.S. 220, 227 (1977) (right to counsel at show-up conducted at preliminary hearing); *Brewer v. Williams*, 430 U.S. 387, 399 (1977) (a post-arraignment Sixth Amendment issue).

[20] Accord, *United States v. Mandujano*, 425 U.S. 564, 603-04 (1976) (Brennan, J., concurring); *United States v. Ash*, 413 U.S. 300, 310 (1973); *Schneckloth v. Bustamonte*, 412 U.S. 218, 239 (1973); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

our adversary theory of criminal prosecution. Cf. *Pointer v. Texas*, 380 U.S. 400." 388 U.S. at 226-27.

Determining whether an accused subject to long-term pre-indictment confinement is constitutionally entitled to counsel thus necessarily turns not on some mechanistic test as suggested by the Solicitor General but rather on whether the presence of counsel prior to indictment is necessary to assure the accused a fair trial. Over the past fifty years, this Court has developed an approach to answering that question. As explained in the carefully crafted opinion in *United States v. Ash*, 413 U.S. 300, 313-17 (1973), each pretrial setting must be critically examined on two levels: first, to determine whether the absence of counsel during that particular pretrial phase would deprive the accused of the kind of assistance historically contemplated by the Counsel Clause; and second, to determine whether counsel's presence at some later juncture is an effective remedy or counterbalance for his earlier absence. On the facts of this case, those questions veritably answer themselves; for as the court of appeals noted, respondents' uncounselled detention irremedially deprived them of the opportunity, fundamental to the right to have the assistance of counsel, to pursue, prepare and preserve a defense.

1. **The Absence of Counsel During Respondents' Eight-Month Confinement in Administrative Detention Denied Them the Assistance of Counsel to Prepare a Defense.** This Court has repeatedly recognized that a fundamental facet of adequate representation in a criminal case is the investigation and preparation of a defense. As early as *Powell v. Alabama*, the Court held that fairness at trial compels the appointment of counsel sufficiently in advance of the trial so as to afford the attorney a meaningful opportunity to investigate, to probe for evidence and to prepare a defense for his client. In *Powell*, the Court held that the failure to appoint counsel until the eve of trial deprived the defendants of representation during the "critical period . . . when consultation, thoroughgoing investigation and preparation were vitally important" (287 U.S. at 57). Further, the Court ruled that subsequent appointment at trial was no substitute: "Neither [counsel] nor the court could say what a prompt and thor-

oughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given" (*id.* at 58).[21]

So fundamental is thorough investigation to an accused's constitutional right to effective assistance of counsel that the lower federal courts have regularly set aside convictions when by neglect or otherwise defense counsel has failed to pursue evidence potentially beneficial to his client.[22] The organized bar too has long recognized that a probing and exhaustive in-

[21] Writing of *Powell*, Mr. Justice Rehnquist observed in *United States v. Henry*, 447 U.S. 264, 291 (1980) (dissenting opinion):

> "[T]he defendants in Powell 'did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself'. . . . They thus were deprived of the opportunity to consult with an attorney, and to have him investigate their case and prepare a defense for trial. After observing that the duty to assign counsel 'is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case,' [287 U.S.] at 71, this Court held that the defendants had been unconstitutionally denied effective assistance of counsel."

See Hawk v. Olson, 326 U.S. 265, 278 (1945) ("The defendant needs counsel and counsel needs time"); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.") *Cf. Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (requiring the presence of counsel at the preliminary hearing in part because "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial").

In *Powell* and again in *Wade*, the Court traced the historical antecedents of the Counsel Clause to discredit the notion that the framers of the Sixth Amendment intended counsel's role to be limited to guiding his client through the intricacies of procedural and substantive law. *See* 287 U.S. at 60-65; 388 U.S. at 224-25. Reacting against English common law rules that confined counsel's responsibility to advising the accused in "matters of law," at the time the Bill of Rights was adopted the constitutions of at least 11 of the 13 states had abolished this limitation and expanded counsel's role to include investigating, marshalling and presenting the facts. *See* W. Beaney, *Right to Counsel in American Courts* 8-26 (1955); Note, *An Historical Argument for the Right to Counsel during Police Interrogation*, 73 Yale L.J. 1000, 1030-34 (1964). Further, the *Powell* Court quoted Zephaniah Swift's 1795 observation, "It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered." 287 U.S. at 64 n.

[22] *See e.g., Washington v. Strickland*, 693 F.2d 1243, 1251 (5th Cir. 1982) (en banc), *cert. granted*, 103 S.Ct. 2451 (No. 82-1554, 1983); *Ford v. Parratt*,

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vestigation of the facts is an essential part of the assistance to which an accused is constitutionally entitled. For example, the American Bar Association's standards for defense counsel provide: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt and penalty."[23] Although perhaps self-evident, the logic of these rules was most apply summarized in *Goodwin v. Swenson*, 287 F.Supp. 166, 182-83 (W.D. Mo. 1968):

> "The most able and competent lawyer in the world can not render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense."

2. **Belatedly-Appointed Counsel for an Inmate Long Held Incommunicado in Administrative Detention Cannot Overcome the Investigatory Obstacles and Other Disadvantages that Result from Delay in Commencing the Preparation of a Defense.** Admittedly, the right to counsel does not attach at every pretrial stage at which an uncounselled accused can be

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638 F.2d 1115, 1117-18 (8th Cir.), *vacated on other grounds*, 454 U.S. 934 (1981); *United States v. Golub*, 638 F.2d 185, 189-90 (10th Cir. 1980); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981); *United States v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980); *Davis v. Alabama*, 596 F.2d 1214, 1217-18 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903 (1980); *Ewing v. Williams*, 596 F.2d 391, 393-94 (9th Cir. 1979); *Rummel v. Estelle*, 590 F.2d 103, 104-05 (5th Cir. 1979); *Wood v. Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978); *Gaines v. Hopper*, 575 F.2d 1147, 1150 (5th Cir. 1978); *Morrow v. Parratt*, 574 F.2d 411, 413 (8th Cir. 1978); *Thomas v. Wyrick*, 535 F.2d 407, 413-14 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); *McQueen v. Swenson*, 498 F.2d 207, 212-13 (8th Cir. 1974); and *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972). Indeed, even Judge Wright, who authored the dissenting opinion below, has recognized the vital importance of early and thorough preparation of the defense. In a decision ordering the pretrial release of a juvenile who claimed that there were many potential defense witnesses he could not identify by name but would recognize by sight, Judge Wright observed: "The ability of an accused to prepare his defense by lining up witnesses is fundamental, in our adversary system, to his chances of obtaining a fair trial." *Kenney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970).

[23] 1 ABA, *Standards for Criminal Justice*, The Defense Function, Standard No. 4-4.1 (adopted Feb. 12, 1979).

disadvantaged, but rather only when the subsequent appointment or presence of an attorney is inadequate to remove the "inequality in the adversary process" resulting from his earlier absence. *United States v. Ash*, 413 U.S. at 319; *see United States. v. Wade*, 388 U.S. at 227-28. For example, the Court in *Ash* held that an accused's right to counsel will not ordinarily extend to the prosecutor's routine trial preparation interviews with witnesses where defense counsel has an equal ability "to seek and interview witnesses himself" (413 U.S. at 318).

With respect to prolonged preindictment detention without counsel, the question thus must be asked: Can an accused inmate, who has been placed an detained indefinitely in solitary confinement pending indictment, reasonably be assured a fair trial by virtue of the appointment of counsel months or years later when formal charges are ultimately brought? Because of the salutary effect of procedural rules which outside the prison walls proscribe long-term pretrial detention without counsel (*see supra*, at 22 note 16), few cases shedding light on this question have arisen. In the rare instance in which one has, however, the courts have condemned the absence of counsel during a prolonged period of pretrial confinement. For example, in *Chism v. Koehler*, 527 F.2d 612 (6th Cir. 1976), *aff'g* 392 F.Supp 659 (W.D. Mich. 1975), *cert. denied*, 425 U.S. 944 (1976), defendant was held in pretrial confinement for over a year while he was forced to litigate his right to appointed counsel. The Sixth Circuit sustained a grant of habeas relief from the ensuing conviction, and adopted the opinion of the district court, which had held that defendant's detention and lack of representation combined to deprive him of a fair trial:

> "During the fifteen months that petitioner was incarcerated without the assistance of trial counsel, he was without means to effectively marshall his defense. He had no way of locating and interviewing witnesses while their memories were fresh. There was no one to gather and preserve evidence which might have been favorable to the defense. Meanwhile, the State was proceeding in the case with all the investigative expertise and resources at its disposal. Such

an imbalance strikes at the very essence of evenhanded criminal justice." 392 F.Supp. at 667.[24]

See United States v. Dolack, 484 F.2d 528, 530-31 (10th Cir. 1973) (dismissing an indictment on right to counsel grounds against an accused who despite his repeated requests, was denied counsel for thirteen months while serving a sentence in Canada for an unrelated offense and who was therefore deprived of the ability "to secure witnesses [and] other evidence"). *See also Cobb v. Aytch*, 643 F.2d 946, 957-62 (3d Cir. 1981) (en banc) (transfer of pretrial detainees to remote prisons violated their right to effective assistance of counsel because such transfers "interfered with what the prisoners could do to help themselves [and] even more drastically with what counsel might have been able to do for them").[25]

In mandating the appointment of counsel for an accused inmate who is isolated pending indictment (or, alternatively, requiring his release from segregation) the court of appeals echoed these concerns. But it also noted the unique "investigatory obstacles" that confront the defense of a prison case, and it found that because of them prolonged preindictment segregation serves "to deny an inmate the opportunity to take steps to preserve his or her own defense" (Pet. App. 11a-

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[24] To the same effect are the observations of this Court in *Smith v. Hooey*, 393 U.S. 374, 379-80 (1969):

> "[I]t is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time."

[25] The Solicitor General observes that many other suspects find themselves similarly disadvantaged — *i.e.* the target of an undisclosed investigation, the suspect serving time who is being investigated for an offense committed outside of prison, an inmate-suspect who has legitimately been transferred to another correctional institution (Pet. Brief 31, 35-36) — and that the court of appeals' decision militates for the appointment of counsel for them as well. The critical difference, of course, is that these suspects have not been held to answer impending criminal charges and thus are not "accuseds" constitutionally entitled to have the assistance of counsel in the first place.

12a). Importantly, the court found these handicaps irremediable by the appointment of counsel months or years later at the time of indictment (Pet. App. 16a). The Solicitor General maintains that the court of appeals grossly exaggerated the handicaps imposed on counsel appointed to defend an inmate who months or years before was isolated in ADU pending the return of formal charges. But if anything, the opinion of the court below understates them.

Endemic to the defense of prison cases is the constantly shifting composition of the prison population. The court of appeals' characterization of the inmate population as "transient" is not without sound foundation. While the average federal inmate population in fiscal year 1981 was 24,933, during that year authorities committed 16,840 new inmates and discharged, either out of the system or from one prison to another, 10,639. Compared to the average inmate population, newly-admitted inmates comprised 67.5%, while those exiting the system (or moving within it) represented 42.7%.[26] In state institutions, the turnover is even greater. For example, during 1981 the mean average inmate population in state facilities was 313,181. During that year, state authorities committed 198,288 new inmates — almost two-thirds of the average — and discharged 162,537 — in excess of one-half.[27]

The impact of these statistics is apparent. If an inmate has been isolated for twelve months in federal administrative detention, his attorney can reasonably anticipate that in excess of four out of each ten inmates he wishes to interview will have long ago departed the institution. If the defendant is in state custody, the chances that an inmate-witness will have been discharged are better than even.

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[26] *See* Federal Bureau of Prisons Inmate Information Systems, Report Nos. 70.53 ("Report of Man Days") and 71.02 ("Report of Commitments and Discharges") (1983). The comparable statistics for fiscal 1982 and 1983 are as follows:

	1982	1983
Average Population	27,730	29,718
New Commitments	19,496	21,677
New Commitments as a %	70.3%	72.9%
Discharges	11,784	12,479
Discharges as a %	42.5%	42.0%

[27] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners In State and Federal Institutions on December 31, 1981*, Tables 1 and 12 (March 1983).

The handicaps under which defense counsel consequently must operate are not minimized by rosters and locator services, which may or may not be available or reliable.[28] To the extent that the prosecution can provide such information and to the extent that it is accurate,[29] it is typically unhelpful in light of the reality that prisoners know one another not by legal identities but by institutional nicknames. *See generally*, D. Clemmer, *The Prison Community* 91-93 (1940). In this case, not only were prison authorities unable to match legal names with sobriquets; they actually sought to enlist defense counsel to assist in compiling such a directory (JA 150).

To these obstacles must be added those which are far more difficult to document but which inevitably result from the nature of the prison environment and its constituents. As numerous social scientists have observed and reported, and as recognized by many courts, the value system within a prison is vastly different from that of the world outside.[30] Living in an environment of unremitting tension, fear, distrust, suspicion and retaliation, inmates operate under a code unique to the institution the quintessential aspects of which are noninvolvement and noncooperation. The principal targets of the code, of course, are members of the prison staff as well as

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[28] In speaking of these aids, the Solicitor General consistently notes only that they "may be available" (Pet. Brief 42). Frequently, they are not. *See, e.g., United States v. Morrison*, 518 F.Supp. 917 (S.D.N.Y. 1981).

[29] An interesting commentary on the reliability of institutional data was provided by an author who studied the New Mexico State Prison uprising. In the aftermath of the riot, "according to the department's own alarming documents, 20 men were still unlocated entirely, eight others were not where official lists had them, five were unaccountably shown to have been paroled months ahead of eligibility, and six were supposed to be in federal prisons that had no record of ever receiving them." *Los Angeles Times*, Dec. 19, 1983, Pt. V (Book Review) at 22 (quoting Roger Morris).

[30] *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 561-562, 586-587, 596-597 (1974); *Pugh v. Locke*, 406 F.Supp. 318, 325 (M.D. Ala. 1976), *aff'd sub nom., Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *modified sub nom., Alabama v. Pugh*, 438 U.S. 781 (1978); *Landman v. Royster*, 333 F.Supp. 621, 646 (E.D. Va. 1971); *Missouri v. Green*, 470 S.W.2d 565, 569 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972); L. Bowker, *Prison Subcultures* (1977); D. Clemmer, *The Prison Community* (1940); J. Irwin *Prisons in Turmoil* 11-36 (1980); *The Prison* (D. Cressey ed. 1966); *Theoretical Studies in the Social Organization of the Prison* (R. Cloward ed. 1960).

other symbols of society's authority, who are never to be accorded respect or prestige and are to be "treated with constant suspicion and distrust."[31] However, as suggested by prison axioms such as "Do your own time," the inmate code permits prisoners to manifest little loyalty to one another.[32] Thus, as numerous first-hand observers have reported, when faced with the choice of intervening on behalf of another inmate — particularly when to do so would require taking a position adverse to the administration — most inmates will decide simply not to get involved.[33]

In tension with the inmate code, however, is what students of prison society have identified as the primary drive of all inmates. As Donald Clemmer reported in his now classic study of the prison environment, unlike the world outside which values "success, service, truth, kindness, and so forth," within the institution "[t]he greatest and only universal purpose is for freedom."[34] Freedom is not defined solely in terms of obtaining outright release, or even a shorter sentence or preferential treatment. Inmates are also motivated to an extent not imaginable outside the institution by revenge or retaliation for prior actions, or simply in order to get rid of someone seen as dangerous or threatening to an inmate's

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[31] Sykes & Messinger, "The Inmate Social System," in *The Sociology of Corrections* 97, 100 (1977) [hereafter "Sykes & Messinger"]; *see* L. Bowker, *supra* note 30, at 135 n. 79; Cloward, "Social Control in the Prison," in *The Sociology of Corrections, supra*, 110, at 129 [hereafter "Cloward"].

[32] *See* Testimony of Prof. Edward C. Weeks (Tr. 1141-42) [hereafter "Weeks' Testimony"]; N. Leopold, *Life Plus Ninety-Nine Years* 141 (1958); Sykes & Messinger, *supra* note 31, at 99-100.

[33] *See e.g.*, Colson, "Towards an Understanding of Imprisonment and Rehabilitation," in *Crime and the Responsible Community* 152, 160 (1980); Hyland, "Diagnosis: Extreme Alienation," in *Inside: Prison American Style* 46, 48 (R. Minton, Jr. ed. 1971); Maguire, "Racism II," in *Inside: Prison American Style, supra*, at 84; Weeks' Testimony (Tr. 1141-42).

[34] D. Clemmer, *The Prison Community* 151 (1940). According to two other commentators, inmates are motivated by the goal of "serving the least possible time and enjoying the greatest number of pleasures and privileges while in prison." Sykes and Messinger, *supra* note 31, at 99. *See generally*, G.M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* 106-08 (1958) (hereafter "Sykes").

safety.[35] As another social scientist points out, because inmates are not constrained by considerations of truthfulness, the prisoner who provides information about a fellow-inmate "may be a liar as well as a betrayer and he threatens the innocent as well as the guilty."[36]

It is in this context that the question of an accused inmate's need for early representation must be considered. *See Wolff v. McDonnell*, 418 U.S. 539, 562 (1974).[37] Isolated from the remainder of the population, an inmate held in ADU without counsel is likely to be disadvantaged in two critical respects. First, as apparent from the previous discussion, there is an enormous temptation on the part of inmates, whether they have actual knowledge of the facts or not, to attempt to discern what they believe prosecution investigators want to hear and then to broker their testimony in exchange for a concession, be it a reduced sentence, a favorable transfer or merely the "hope . . . to preclude bodily harm, receive amnesty for their own indiscretions or retaliate against real or imag-

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[35] *See* L. Carroll, *Hacks, Blacks and Cons* 84 (1974); Cloward, *supra* note 31, at 124-25; Cressey & Krassowski, *Inmate Organization and Anomie in American Prisons and Soviet Labor Camps*, 5 Soc. Probs. 217, 218-19 (1958); Sykes, *Men, Merchants and Toughs: A study of Reactions To Imprisonment*, 4 Soc. Probs. 130, 134-35 (1956).

[36] Sykes, *supra* note 34, at 89. Indeed, according to sociologists who have studied the prison environment, the chief impediment to collecting accurate data is the inability of a researcher to rely on information an inmate divulges to a person in authority. *See* D. Ward & G. Kassenbaum, *Womens Prison: Sex and Social Structure* 245 (1965); W. Williams & M. Fish, *Convicts, Codes, and Contraband* xxii (1974); Morris, "The Sociology of the Prison," in *Criminology in Transition* 69, 85 (1965).

[37] To all of this must be added "[t]he atrocities and inhuman conditions of prison life in America," *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting), including the constant threat of brutality and violence by and towards both prisoners and guards and the frequent harassment and retribution by prison officials against prisoners who inconvenience them. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *Stevens v. Ralston*, 674 F.2d 759, 760 (8th Cir. 1982); *Bono v. Saxbe*, 450 F.Supp. 934, 943 (E.D. Ill. 1978), *modified*, 620 F.2d 609, 617 (7th Cir. 1980); *Laaman v. Helgemoe*, 437 F.Supp. 269, 305-306 (D.N.H. 1977); *Landman v. Royster*, 333 F.Supp. 621, 627, 628, 631, 633-637, 650 (E.D. Va. 1971); *Sostre v. Rockefeller*, 312 F.Supp. 863, 869-871 (S.D.N.Y. 1970), *modified*, 442 F.2d 178 (2nd Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

ined aggressors."[38] While some of this information may be truthful, much may not be; and the passage of time before someone inquires on behalf of the accused makes discerning one from the other that much more difficult. Further, as time lapses without witnesses being interviewed and statements taken, potentially untruthful inmates are afforded greater opportunity to assess how a situation can be turned to their advantage and to seize the occasion.[39]

Even more unfair to the accused inmate are the forces that operate on potential witnesses who are in possession of information likely to be helpful to the defense. As noted before, such inmates are unlikely to volunteer what they know to prison personnel and police investigators not only because of an inmate code which proscribes cooperation generally and which compels an inmate to avoid becoming involved in another's affairs, but also because merely speaking with authorities will open an inmate to charges of being an informer.[40] As a result, the Government's investigation of a prison crime, no matter how thorough and impartially conducted, necessarily becomes one-sided. Cooperating inmates by definition will be those who prepared to provide information damaging to the accused, while potential defense witnesses will be excluded by a process of self-selection. Thus, unlike the situation outside the prison, counsel appointed for the accused inmate cannot assume that merely because the Government has fairly and fully investigated, potentially exculpatory witnesses will have been identified and their testimony preserved.

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[38] Guenther & Guenther, " 'Screws' vs. 'Thugs,' " in *Criminal Behavior and Social Systems* 511, 525 (2d ed. 1976).

[39] We do not mean to suggest that prosecutors would deliberately solicit or make use of false testimony. The fact of the matter is, as one study revealed, "officials may find themselves being manipulated by their prisoners into a position where they are serving unintentionally as a weapon in the battles taking place among the inmates. There is always the danger that they will be gulled in the process. . . ." Sykes, *supra* note 34, at 89. *See also* Sykes, *Men, Merchants and Toughs: A Study of Reactions To Imprisonment*, 4 Soc. Probs. 130, 134 (1956). Indeed, this is a common experience among prison therapists. *See e.g.*, Bogan, *Client Dissimulation: A Key Problem in Correctional Treatment*, 39 Fed. Probation 20, 20-22 (1975).

[40] *See* Cloward, *supra* note 31, at 129. Furthermore, a prisoner may rightly be concerned about how any information he may volunteer may be used. Any testimony tending to absolve one potential defendant is quite likely to help incriminate another, and hence, be likely to open the witness to retaliation.

Further, the unseen forces that operate within a prison serve not only to conceal potential defense witnesses but frequently to neutralize them. Because of the prison ethic "do your own time," rather than divulge information favorable to a fellow inmate, a prisoner interrogated by prison authorities or prosecution investigators is far more likely to deny knowledge altogether and, if necessary, to fabricate a story to distance himself from the events in question.[41] With no one developing testimony on behalf of the accused until months or years later, potential defense witnesses are likely to be either neutralized by prior, inconsistent statements or unwilling to testify for fear that they will be punished or prosecuted for their earlier, false statements.

Against the backdrop of a shifting institutional population, inmate anonymity, the reluctance of inmates to come forward with exculpatory information, their willingness to broker testimony regardless of its truth and their inclination to lie rather than get involved, an enormous tactical advantage lies with the prosecution when for months or years it alone has access to the inmate population and the ability to investigate. The unrepresented inmate held in solitary confinement, by contrast, has no one on his behalf to identify witnesses, to preserve favorable testimony, to counterbalance the corrupting influences that may lead a prosecutor unwittingly to induce fabricated testimony, or to discourage potential defense witnesses from naively providing a basis for their later impeachment. Instead, he is relegated to an investigation conducted long after the fact when potentially critical witnesses are long gone and the testimony of those that remain is indelibly fixed.

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[41] *See, e.g.*, Weeks' Testimony (Tr. 1141-42). Indeed, in this case deliberate attempts to neutralize potential defense witnesses in this fashion continued even after the appointment of counsel. Purportedly for the purpose of scheduling witness interviews, prison authorities required defense counsel to provide in advance of their arrival at the institution a list of the inmates with whom they wished to speak. In fact, these lists were routinely provided to FBI agents who would then interrogate potential defense witnesses before they could be interviewed by the defense counsel. Forced to submit to these FBI interviews (a privilege not afforded to the defense until the court so ordered), these inmates typically disclaimed any knowledge of the Hall murder. *See* Defendants' Motion for Protective Order 4-6, 9-11 (CR 41).

The Solicitor General nonetheless argues that the inmate held in isolation pending indictment may avail himself of opportunities to investigate and preserve testimony. First, it is suggested that the inmate may provide a full account to FBI investigators. Aside from ignoring that such self-help would first require the inmate to waive Fifth Amendment safeguards[42] — and, by cooperating with officials, to behave in a way contrary to the institutional ethic — the suggestion is ironic. Prior to being interrogated by FBI agents on the evening of the Hall murder, respondents were advised that they had the right first to consult with counsel, retained if they could afford it, appointed if not. When respondents asked to speak with lawyers, however, the agent in charge summarily terminated the interview (JA 128).[43]

The Solicitor General alternatively suggests that an isolated inmate may enlist the assistance of a staff member who, during disciplinary proceedings, is available to collect evidence on behalf of the inmate. Putting aside the conflict inherent in asking a member of the prison staff to assist an inmate in disproving charges preferred by a fellow-employee,[44] the suggestion is wholly unrealistic. In the first place, institutional pressures make it impossible to expect that an inmate-suspect would repose trust in a representative of the administration, no less authorize a staff member to approach prisoners on his behalf. To suggest otherwise is

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[42] *Cf. Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.")

[43] For many of the same reasons, it is unrealistic to suggest that the accused inmate can make a record of his defense by testifying at the prison's disciplinary hearing. A committee of the American Bar Association has also criticized this as creating for the inmate a "cruel dilemma":

> "[I]f he testifies in that hearing, the testimony is admissible in [any] later criminal proceeding; if he does not testify, he is almost assured of being found in violation of prison regulations and subject to severe penalties."

ABA Joint Committee on the Legal Status of Prisoners, Standard No. 3.3, Commentary (Tent. Draft), *reprinted in* 14 Am. Crim. L. Rev. 377, 454 (1977).

[44] Several courts have commented on the "siege mentality" within the institution, on the part of prison staff members no less than on the part of prisoners. *See, e.g., Landman v. Royster*, 333 F.Supp. 621, 645-46 (E.D. Va. 1971). Further, as noted by one candid lawyer employed by the State

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to deny the reality that, as perceived by prisoners, prison personnel are to be viewed with suspicion and distrust. Further, using a staff member as an intermediary to communicate with fellow-inmates and thereby involve another inmate in one's own problem would transgress the prison code. As respondent Mills explained in characteristic understatement, "The inmates with whom you must live on a daily basis respond very badly to having their name given out in that manner" (JA 130). Finally, it belies reality to expect that an inmate so approached would perceive the staff member as a legitimate intermediary even were the inmate prepared to risk being labeled a "snitch" or to open himself to retaliation for unwittingly implicating someone else.

Contrary to the Government's view, there is no adequate counterbalance to an aggressive prosecutive investigation short of providing counsel for an inmate who by virtue of his isolation has been disabled from undertaking his own investigation.[45] The court of appeals recognized this. Con-

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of Texas to provide legal assistance to inmates, staff members cannot reasonably be expected to advocate against the administration:

> "[a]s employees, we do not believe that we can honestly represent inmates who wish to sue prison officials, to prosecute that litigation if we are working with, eating with, and in some cases living on the units with other prison officials, and I think the personal conflicts there are pretty obvious."

Quoted in *Hooks v. Wainwright*, 536 F.Supp. 1330, 1348 (M.D. Fla. 1982). Additionally, reliance on a staff member presents the same Fifth Amendment dilemma for the inmate as speaking with the FBI or testifying before a disciplinary committee. Indeed, Bureau of Prisons regulations appear to prohibit the staff member from discussing the incident with his "client" without first admonishing the inmate that his statements may be used against him and without first obtaining FBI approval. *See* 28 C.F.R. § 541.41(b)(1); U.S. Dep't of Justice, Federal Prison System, Program Statement No. 5507.1 (Feb. 19, 1968).

[45] We do not mean to suggest that assuring fairness at the eventual trial compels that the inmate-suspect be afforded absolute parity with the Government in terms of the commencement of an investigation or its thoroughness. On the other hand, as Judge Charles Wyzanski observed in a similar setting (negligent failure of defense counsel to conduct an investigation):

> "[The Constitution] does not leave the poor to a representation which is in any aspect — pretrial, investigatory, trial, or otherwise — shockingly inferior to what may be expected of the prosecution's representation. While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975).

sistent with this Court's teaching in *Powell* that the obligation to provide counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation . . . of the case" (287 U.S. at 71), the court of appeals struck a reasonable balance. True to the language of the Sixth Amendment, the en banc opinion requires appointment of counsel for an indigent inmate confined in ADU only after he establishes that legitimate security concerns have ceased to exist and that his detention has been continued to hold him to answer impending criminal charges. And in no event need counsel to be appointed or, alternatively, the inmate released back into the general prison population within the first ninety days of his incarceration — a period plainly adequate to permit tempers to cool, for prison authorities soberly to assess the need for disciplinary or remedial action and for the Government to determine whether it intends ultimately to prosecute.

II. BECAUSE RESPONDENTS' PROLONGED, UNCOUNSELLED SEGREGATION PENDING INDICTMENT SIGNIFICANTLY IMPAIRED THEIR RIGHT TO A FAIR TRIAL, THE COURT OF APPEALS PROPERLY DISMISSED THE CHARGES AGAINST THEM

Having scrupulously monitored this case throughout its pretrial phase, the district court concluded that respondents' eight-month isolation without counsel had irreparably deprived them of an opportunity for a fair trial:

> "Defendants' eight-month detention in ADU, their total segregation from the general prison population and the government's refusal to appoint counsel or some other neutral investigator on their behalf combined to prejudice irreparably the defendants' ability to prepare for trial and to contest the charges against them. Specifically, defendants have been prejudiced by the dimming of memories of witnesses who could have substantiated their alibi; by the irrevocable loss of inmate witnesses known to the defendants only by prison "nicknames" now long-since transferred to other institutions or released from custody altogether; and by the deterioration of physical evidence essential to corroborate the defendants' testimony and to

rebut the evidence against them. In short, because of their belated appointment, and because of the transitory nature of the prison population, defense counsel simply did not have the opportunity to make the kind of investigation that the government made. The handicaps under which the defense must now operate cannot be remedied at this late date" (Pet. App. 46a-47a).

Following respondents' convictions, the court of appeals conducted an independent review of the record which also convinced it that respondents' prolonged isolation without counsel "unconstitutionally obstructed [their ability] to defend themselves at trial" (Pet. App. 23a). Under standards established by this Court, no basis exists for disturbing the court of appeals' order of dismissal.

A. The Courts Below Had Substantial Basis for Concluding that Respondents' Denial of Counsel Significantly Impaired Their Attorneys' Ability to Provide Effective Representation

In *United States v. Morrison*, 449 U.S. 361 (1981), this Court had recent occasion to reassess the standards for dismissal of an indictment on account of a right to counsel violation. Unlike the present case, *Morrison* involved not a denial of counsel at any critical stage, but the unauthorized intrusion of federal agents into an attorney-client relationship. With full knowledge that respondent was represented by retained counsel, agents of the Drug Enforcement Agency twice approached respondent, sought her cooperation in a related investigation and disparaged the abilities of her retained attorney (*id.* at 362). On neither occasion did respondent make any incriminating statements or supply the agents with any information concerning her case (*id.* at 362-63). Nonetheless, respondent moved to dismiss the indictment, citing only the egregious behavior of the federal investigators and contending only that the agents had interfered with her right to counsel in some unspecified way (*id.* at 363).

Reversing the dismissal order entered by the Third Circuit, the Court observed:

"The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse

effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *Id.* at 365.

This case is light-years removed from *Morrison*. First, unlike *Morrison*, which presented merely an unauthorized and unfruitful intrusion into an existing attorney-client relationship, respondents in this case were denied representation entirely for up to twenty months during what the court of appeals characterized as a period "critical to [respondents'] ability to prepare and preserve a defense" (Pet. 12a).

Second, again in marked contrast to *Morrison*, respondents adduced abundant evidence that the Sixth Amendment violation had rendered their belatedly-appointed lawyers unable to provide the assistance at trial that the Constitution requires. In pleadings submitted to the district court, defense counsel chronicled their inability some ten months after the murder to investigate the charges against their clients and to probe for exculpatory evidence. Helpful witnesses known only by jailhouse monikers had been transferred to other institutions or released from custody altogether, and thus were irretrievably placed beyond the reach of defense counsel (JA 125, 150-51). Many of the witnesses located by counsel were insufficiently confident of their recollections a year after the fact to run the risk of what they viewed as certain reprisals by prison officials.[46] Other witnesses, who immediately after the murder sought to deflect prosecution investigators by concocting false stories to distance themselves from the events in question, declined to testify in light of their own potential

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[46] For example, one inmate interviewed by defense counsel believed that the Government's principal non-inmate identification witness had contradicted himself during a private conversation, but the inmate was insufficiently certain of the details of the discussion to risk incurring the wrath of prison officials (or, as FBI agents had admonished him, being prosecuted for perjury) by testifying (JA 153). For similar reasons, another inmate declined to swear to his recollection of a conversation that took place prior to the Hall murder during which the Government's principal inmate witness threatened to seek revenge against respondent Mills for his refusal to protect Thomas Hall (*id.*).

criminal liability for providing false statements (or if the Government chose to accredit their earlier statements, for perjury at trial) (JA 153; CR 41, at 6).

The Solicitor General's misapplication of *Morrison* to the facts of this case is accompanied by a standard of prejudice that has no place in remedying a right to counsel violation (discussed more fully *infra*, at 46-50). Thus, the Solicitor General criticizes the court of appeals for relying on respondents' pretrial proof of prejudice and for failing to conduct "a post-trial, case-specific analysis" of the record made at trial "to determine whether [respondents] suffered actual and specific prejudice" (Pet. Brief 18). But when prejudice stems from the unavailability of witnesses because of counsel's belated appointment and the faded recollections of those that are ultimately found, of what utility is a searching review of the trial record? The testimony of those witnesses who appeared at trial reveals nothing of the import of those who did not. And the recollections of those called to testify sheds no light on what has been forgotten.

The futility of searching for prejudice in a trial record has frequently been the subject of comment. As Mr. Justice Brennan wrote of the inherent difficulties in establishing a record of the prejudice that results from a violation of the Speedy Trial Clause:

> "Although prejudice seems to be an essential element of speedy-trial violations, it does not follow that prejudice — or its absence, if the burden of proof is on the government — can be satisfactorily shown in most cases. . . . Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses." *Dickey v. Florida*, 398 U.S. 30, 53-54 (1970) (concurring opinion).[47]

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[47] *See also Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) (prejudice resulting from defense counsel's conflict of interest will not appear on the record); *Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if

(*Footnote continued on next page*)

In any event, it is simply not true that the court of appeals made no review of the trial record in reaching the conclusion that respondents had been prejudiced by the denial of counsel. Indeed, its opinion reflects just the contrary.[48] And the trial record substantiates rather than undercuts respondents' pretrial evidence of prejudice. Although the record obviously does not reveal what missing witnesses would have said or what forgetful witnesses would have recalled, it vividly illustrates in a number of respects the handicaps caused by the delay in appointing counsel for these accuseds, who all the while were prevented from probing for evidence themselves.

Key to the prosecution's inconsistent and often incredible case against respondents was the Government's purported evidence of a motive. The prosecution offered a tenuous but colorable theory: that respondent Mills murdered Thomas Hall to avenge Mills' placement in protective detention during the summer of 1979 on account of erroneous information

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defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.") A number of lower federal courts have also acknowledged the near impossibility of adducing from the trial record concrete evidence of the prejudice that results when an accused is rendered unable to initiate a prompt investigation. *See, e.g., Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965); *United States v. Wahrer*, 319 F.Supp. 585, 588 (D. Alaska 1970) ("The specific showing of prejudice can be a difficult task. In what manner can a defendant show that he would have been able to find a particular witness, or piece together a certain bit of evidence if the government had carried through the indictment and arrest judiciously.") *See also United States v. Mays*, 549 F.2d 670, 682 (9th Cir. 1977) (Ely, J., dissenting) ("The obvious question, as the majority recognizes, is in what manner can a defendant show that particular witnesses, no longer available or laboring under stale memories, could enhance his defense if the government had proceeded through the indictment judiciously? . . . The obvious answer, in the overwhelming number of cases is, I should think, that the burden of summoning affidavits from buried bodies or dimmed minds will be insurmountable.") *Cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982) (defendant's inability to interview missing witnesses "may well support a relaxation of the specificity required" in establishing a violation of Compulsory and Due Process Clauses).

[48] "*The record convinces us* that preindictment isolation without the assistance of counsel unconstitutionally obstructed the ability of [respondents] to defend themselves at trial" (Pet. App. 23a) (emphasis added).

knowingly supplied to prison officials by Hall.[49] However, prior to trial the prosecution was compelled to produce to respondents documents suggesting that someone other than Mills or Pierce had long before embarked on a campaign to rid the prison of Mr. Hall. In April, 1979, well before Mills' placement in protective confinement (Tr. 342, 362) and even prior to Pierce's arrival at Lompoc (Tr. 1392), Hall's cell in K Unit was firebombed. Several days later, he was placed in protective detention (apparently with his acquiescence (Ex. 104; Tr. 1102-03)) on the basis of information confidentially revealed to prison authorities by three inmates "that his life was in danger, and he would possibly be killed" (Tr. 1091, 1093). Writing to his parents from ADU shortly thereafter, Hall penned a farewell letter to his family and asked that it be read "at my funeral" (Ex. 105B; Tr. 1104-05).

As they predicted would be the case prior to trial (JA 154-55), respondents' counsel were wholly foreclosed from exploiting this powerful exculpatory evidence because of their inability some fourteen months after the fact to locate witnesses capable of providing competent testimony. Left to their own devices, respondents were unable to trace the whereabouts of the three inmates who told prison authorities in April 1979 (four months before the murder) that Hall's life was in danger. Further, although numerous inmates who were interviewed during the summer of 1980 professed to having had knowledge of the events surrounding the earlier attempt on Hall's life, none was sufficiently certain of those events fourteen months later to testify under oath (*id.*). As a result, respondents were relegated at trial to establishing the sterile facts of the April 1979 events, but failed entirely

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[49] The evidence supporting the prosecution's theory consisted of a statement purportedly made by Mills to inmate Wagner when both were being held in protective detention. Wagner recalled that "[Mills] had an idea why he was there, and that he was going to take care of it when he got out" (Tr. 344). This statement was coupled with the testimony of a prison counselor that Hall had provided the information which had resulted in Mills' protective confinement (Tr. 474). Curiously, inmate Wagner acknowledged that Mills never identified Hall as the person he believed was responsible for his detention (Tr. 344), and the counsellor conceded that prior to Hall's death, he had not told "a single solitary living soul" that Hall was the source of the information that led prison authorities to isolate Mills (Tr. 477).

in offering the jury a clue as to why Hall feared for his life, why a prior attempt to kill him had been made and, most importantly, who was responsible.

The trial record also provides evidence of another kind of prejudice. Pretrial submissions established that during the nearly one-year investigatory head-start arrogated by the prosecution when respondents could conduct no investigation of their own, more than fifteen percent of the prison population had been interrogated by federal agents.[50] Not suspecting that respondents would solicit their testimony, and seeking to avoid any involvement, many of these inmates concocted stories to distance themselves from the events in question. As a result, respondents' counsel were prevented from even adducing the testimony of those inmates who feared prosecution for false swearing or perjury, and the Government assured itself a veritable field day in impeaching defense witnesses. Indeed, of the three defense witnesses who described the Hall murder, all three were impeached with prior statements placing them well outside E Unit at the time of the crime (Tr. 1023-24, 1038-40, 1055-56); and of the three witnesses who testified that neither Mills nor Pierce entered or departed the E Unit on the evening of the murder, each confessed to having lied to prosecution investigators when shortly after the murder they said they were elsewhere that night (Tr. 692, 696, 720-22, 741-42).[51]

Our point is not that an examination of the trial record alone will reveal conclusively that respondents were denied

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[50] On the evening of the Hall murder, 904 inmates were residing in general population at the Lompoc Penitentiary (Ex. 34; Tr. 610-11). Within the first six months after the murder, FBI agents interrogated in excess of 146 of them (JA 143-46).

[51] The prosecution took pains to preserve this tactical advantage. Purporting to invoke the Jencks Act as a shield, it refused to produce any statements taken from inmates it did not intend to call as trial witnesses. *See* Government's Opposition To Defendant's Motion For Discovery 4-6 (CR 44). And when the district court ordered some of these statements produced pursuant to Fed. R. Crim. P. 16, the Government successfully petitioned a panel of the Ninth Circuit for a writ of mandate, which held — erroneously we submit — that the Jencks Act prohibits discovery of statements of individuals the Government does not intend to call, regardless of their materiality under Rule 16. *See* Pet. App. 38a-40a. Respondents' petition for review of that ruling was denied. *Mills v. United States*, 454 U.S. 902 (1981).

a fair trial. Rather, the record is indicative of obstacles and handicaps that an experienced trial judge, fully conversant with the evidence in the case and the realities of prison life,[52] believed an accused should not have to confront and suffer under. In his view, and that of the court of appeals, prejudice inheres in a situation in which for eight critical months the prosecution is able to conduct full-scale trial preparation while the defense cannot even start. The trial record only serves to confirm that view.

The courts below are not alone in concluding that the denial of a meaningful opportunity to investigate is necessarily prejudicial to a defendant in such circumstances. For example, in *United States v. Morrison*, 518 F.Supp. 917 (S.D.N.Y. 1981), a strikingly similar case involving an assault committed in prison, the defendant's investigation was hindered by the Government's failure to preserve a list of inmates who were confined in the unit in which the crime took place. In response to a motion to dismiss, the Government managed to locate two undated rosters which, together with a related list secured by the defense, provided the names of some twenty-four inmates who were in the unit on the date in question. Although the defendant could point to no specific witness or item of testimony that had been irretrievably lost, the district court ruled that the defendant had "been deprived of the opportunity to interview witnesses who very possibly have exculpatory testimony to offer", and thus could not reasonably be assured a fair trial (*id.* at 918-19):

> "Despite these efforts [of the Government to identify all of inmates who were confined in the unit in which the assault took place], however, there remains a strong possibility that there were other inmates who witnessed the assault but who are not named on the lists now available. The defense counsel represents that one such witness has been found whose testimony may prove beneficial to the defense.

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[52] *See Rutherford v. Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978) (Gray, J.) (conditions of post-conviction confinement in county jail); *Stewart v. Gates*, 450 F.Supp. 583 (C.D. Cal. 1978) (Gray, J.), *remanded*, 618 F.2d 117 (9th Cir. 1980) (policies respecting inmates' communications with the outside world); *Dillard v. Pitchess*, 399 F.Supp. 1225 (C.D. Cal. 1975) (Gray, J.) (treatment of pretrial detainees).

Undoubtedly there are other witnesses who would provide exculpatory testimony but whose whereabouts will never be known from available information."[53]

This Court counselled in *Morrison* for judicial responsiveness "to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective" (449 U.S. at 364). The Court noted that judicial intervention is appropriate when "the constitutional infringement identified has had *or threatens* some adverse effect upon the effectiveness of counsel's representation" (*id.* at 365) (emphasis added). And it approved dismissal of an indictment, admittedly an extreme remedy, where the Sixth Amendment violation results in a *"substantial threat"* of "demonstrable prejudice" (*id.*) (emphasis added). On the facts of this case, and after a thorough consideration of *Morrison*, the court of appeals justifiably concluded that at a minimum such a threat was present here. In the absence of any lesser remedy for the denial of assistance of counsel, at the only time it would have been of use to respondents in preparing and preserving a defense, it properly dismissed the indictments.[54]

B. This Court Should Not Discard the *Morrison* Standard for a Test Requiring Proof of Actual Prejudice

Although not expressly proposing it, the Solicitor General implicitly asks this Court to discard the "substantial threat of prejudice" standard it so recently reaffirmed in *Morrison* in favor of the "actual prejudice" test used to evaluate under the Fifth Amendment claims of undue preaccusation delay. Thus, he maintains that the absence of counsel at a critical stage should not be sufficient to upset a conviction unless the defendant establishes that he "has suffered actual and specific prejudice as a result of the failure to appoint counsel" and the prejudice is so "serious . . . that he can be said to have been

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[53] Noting that "[a]n accused has a fundamental right to present his own witnesses to establish a defense," the district court dismissed the indictment "because the clear prejudice to defendant here requires it" (518 F.Supp. at 919). *Accord, Chism v. Koehler*, 527 F.2d 612 (6th Cir.), *cert. denied*, 425 U.S. 944 (1976); *United States v. Dolack*, 484 F.2d 528 (10th Cir. 1973).

[54] The Solicitor General's proffer of alternative remedies — "cross-examination, argument to the jury, and [jury] instructions" (Pet. Brief 50 n.40) — misses the point. Under our system, it is the responsibility of the court and not of the fact-finder to remedy constitutional violations.

denied a fair trial" (Pet. Brief 18, 50). As he applies it to the facts of this case, the Solicitor General seems to advocate a standard requiring concrete proof that but for the right to counsel violation, in all likelihood the defendant would have won an acquittal.

The standard proposed by the Solicitor General runs contrary to over forty years of Sixth Amendment jurisprudence. As early as *Glasser v. United States*, 315 U.S. 60, 76 (1942), the Court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." Since *Glasser*, the Court has repeatedly overturned convictions without requiring the showing of the specific prejudice which the Solicitor General would have the Court now demand where counsel was not provided at some critical stage or where he was prevented from discharging his normal functions. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475 (1978); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).[55]

We do not mean to suggest that the predicate for overturning convictions in these cases was not prejudice to the accused. However, "[t]here is a difference between a requirement that a defendant suffer some prejudice and a requirement that he show some specific prejudice." *Morris v. Slappy*, 103 S. Ct. 1610, 1624 n.9 (1983) (Brennan, J., concurring). Just as the lawyers' conflict of interest in *Holloway* and *Glasser* "itself demonstrated a denial of the 'right to have the effective assistance of counsel,'" *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980), respondents' denial of assistance at a

[55] Indeed, in *Coleman v. Alabama*, 399 U.S. 1 (1970), the Court vacated a conviction and remanded for a determination of whether denial of counsel at a preliminary hearing could be deemed harmless over Mr. Justice Harlan's vigorous dissenting view that reversal should require a showing that defendants were "prejudiced in their defense at trial, in that favorable testimony that might otherwise have been preserved was irretrievably lost" (*id.* at 20). And in *Holloway*, where petitioner had been denied effective assistance by virtue of her attorney's conflicting interests in representing multiple defendants, the Court expressly declined to impose an "actual prejudice" standard, noting that inquiry under that test "would require . . . unguided speculation" (435 U.S. at 491).

stage critical to the preparation of their defense alone demonstrates prejudice to their case. Accordingly, the lower federal courts have never required proof of actual, specific prejudice when the Sixth Amendment violation stems from a failure to appoint counsel under circumstances that prevent the attorney from discharging his or her obligation to make a thorough investigation of the facts. *See, e.g., Chism v. Koehler*, 527 F.2d 612 (6th Cir.), *cert. denied*, 425 U.S. 944 (1976); *United States v. Dolack*, 484 F.2d 528 (10th Cir. 1973).[56]

There are many sound reasons for rejecting the "actual prejudice" test developed under the Fifth Amendment as a tool for safeguarding the right to counsel under the Sixth. First, unlike the target of a delayed indictment, who is free to conduct his own investigation and capable of building evidence to show the adverse effects of delay to his defense, the accused who is detained without counsel for a prolonged period pending indictment can do neither. Secondly, when the complaint is merely preaccusation delay, the most the Government typically can be charged with is neglect, a far lesser offense than the Government's breach of a constitutional obligation to provide the accused with the assistance of counsel.

Thirdly, the "Due Process Clause has a limited role to play" in combatting oppressive delay, *United States v. Lovasco*, 431 U.S. 783, 789 (1977), because the paramount protection is afforded by statutes of limitations. *See United States v. Marion*, 404 U.S. 307, 322 (1971). In contrast, the right to counsel is of critical importance in protecting the rights of an accused. As former Chief Justice Walter V. Schaefer ex-

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[56] Moreover, requiring proof of actual prejudice under the circumstances of this case would create the ironic result of favoring defendants who have received the prompt appointment of *incompetent* counsel over defendants who have languished in jail or prison for months or years totally without the advice of or investigation by counsel. Where the accused has been denied effective assistance by virtue of his lawyer's neglect and through no fault of the state, he must show some measure of prejudice, but none of the circuits has imposed an "actual prejudice" test as demanding and ungiving as what the Solicitor General proposes here for the more egregious failure to provide an attorney altogether. *See, e.g., Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. 1982) (en banc), *cert. granted*, 103 S. Ct. 2451 (No. 82-1554, 1983) ("actual and substantial disadvantage to the course of his defense"); *United States v. Wood*, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc) ("likely to have resulted in prejudice to appellant's case").

plained, "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).

Next, the "actual prejudice" standard would impose an impossible burden on a defendant who has been deprived of counsel's assistance in the early investigation and preparation of the case, particularly where the defendant has been locked away and unable to take steps to assemble a defense himself. As noted earlier, when an accused has been denied an opportunity to probe for evidence, proof of actual, specific and nonspeculative prejudice is elusive, and only rarely can such prejudice be demonstrated.[57] What a lawyer could have discovered typically is as unknowable and as subject to "unguided speculation" as what the lawyers operating under conflicts of interest in *Holloway* and *Glasser* would have done differently had they not suffered from divided loyalties.

Finally, inasmuch as due process protection against unwarranted delay is aimed chiefly at redressing "prejudice to the defense," *United States v. Marion*, 404 U.S. at 324-25, it is appropriate in Fifth Amendment cases to focus on whether the impact of delay might have affected the outcome of the case. However, the Court's opinion in *Morrison* reaffirms that the rationale of the Sixth Amendment right to counsel is much broader: "This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process" (449 U.S. at 364). Necessarily, the test under the Sixth Amendment must be different than that under the Fifth; it must focus not on whether the right to counsel violation

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[57] Indeed, our research has disclosed only three federal cases since this Court's decision in *Marion* in which a defendant urging preaccusation delay has carried his burden: *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976); *United States v. Morrison*, 518 F.Supp. 917 (S.D.N.Y. 1981); and *United States v. Wilson*, 357 F.Supp. 619 (E.D. Pa.), *appeal dismissed*, 492 F.2d 1345 (3d Cir. 1973), *rev'd on other grounds*, 420 U.S. 332 (1975), *aff'd mem.*, 517 F.2d 1400 (3d Cir. 1976) (affirming the dismissal). The courts of appeals have frequently commented on the extraordinary and almost impossible burden of proving prejudice under the Fifth Amendment standard. *See, e.g., United States v. Solomon*, 686 F.2d 863, 871-72 (11th Cir. 1982); *United States v. Jackson*, 504 F.2d 337, 339 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). *See also United States v. Lovasco*, 431 U.S. 783, 796-97 (1977).

affected the *outcome* of the criminal proceeding but on whether it impaired the *fairness* of that proceeding. The *Morrison* "substantial threat" standard is uniquely suited for gauging the kind of prejudice that results from a right to counsel violation, and should not be discarded for one that is not.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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February, 1984